



FINDINGS OF FACT

Claimant has worked for respondent for over 10 years as a mental health technician at Larned State Hospital, escorting and attending to 30 criminally insane residents, as well as providing some security.

On Saturday, June 1, 2013, while preparing to escort residents to the cafeteria, claimant entered a restroom, slipped on the wet floor and bumped her head on the sink. She "didn't think too much of it"<sup>1</sup> and finished working a double shift. At the time, she did not report the accident or complete an accident report. That evening, she noticed a headache. David Gilkey, claimant's husband, testified claimant mentioned to him that she had fallen at work earlier that day and struck her head.

On Monday, June 3, 2013, claimant called in sick explaining that she had a headache and was leaning to the left, unbalanced. She did not mention the fall at work. Claimant was not scheduled to work again until Monday, June 10, 2013.

Claimant continued to experience sporadic headaches and sought treatment with her personal physician, Robert E. Wray, D.O., on Friday, June 7, 2013. Claimant reported to Dr. Wray that she was unbalanced and experiencing headaches. Dr. Wray thought her symptoms might be related to her heart, insofar as she had a heart attack about ten years earlier, and ordered a Doppler. Claimant specifically denied mentioning the fall at work to Dr. Wray because she "didn't think anything of that fall."<sup>2</sup> However, Mr. Gilkey testified he believed he mentioned claimant's fall to Dr. Wray.<sup>3</sup>

On June 10, 2013, claimant spoke with Lynn Manus, her acting supervisor, and advised she would not be in that day or the next because Dr. Wray had scheduled her for a Doppler and blood work. She again did not mention the fall at work. After the Doppler and blood work failed to reveal a cause for claimant's symptoms, Mr. Gilkey insisted an MRI be done. According to Mr. Gilkey, Dr. Wray only reluctantly agreed to order the MRI.

On June 12, 2013, claimant underwent the MRI, which revealed a subdural hematoma. According to claimant, "Gerald," the physician performing the MRI, told her he believed her injury was the result of a "blow to the head."<sup>4</sup> Claimant was immediately scheduled for surgery and underwent a right craniotomy for a subdural hematoma on June 13, 2013 by John R. Dickerson, M.D., at Wesley Medical Center.

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<sup>1</sup> P.H. Trans. at 13.

<sup>2</sup> *Id.* at 17.

<sup>3</sup> *Id.* at 45.

<sup>4</sup> *Id.* at 21.

Only following surgery did claimant first link her fall at work and her head injury.<sup>5</sup>

Mary Ann Haynes works for respondent as an administrative specialist. As part of her job, she receives notifications regarding work-related accidents. Ms. Haynes testified employees can either tell their supervisor or contact a hotline and leave a voice mail message to report an accident. The voice mail system is checked daily. Following that, they complete an incident report.

Ms. Haynes testified that on or about June 20, 2013, she received a call from Wesley Medical Center wanting to verify claimant's accident at work and requesting contact information for their workers compensation carrier. Ms. Haynes had no prior knowledge that claimant sustained an accident at work. She referred the caller to respondent's workers compensation representatives.

Upon claimant being released from the hospital on June 20, 2013, claimant had her husband fax a document to respondent which stated:

This will confirm that employee I sustained a traumatic accident while working for Larned State Hospital on June 3, 2013. Specifically, I was in the process of working when I entered the bathroom. The bathroom floor was wet. This caused me to slip and fall. I struck my head.

I subsequently went back to work. I thought I would be fine. I experienced a headache and pain in my neck, but I thought it would go away.

I continued to work the following day and noticed issues involving my balance which caused me to fall into the walls while on the job and hit my head. I contacted Dr. Ray [sic] in Kinsley about my concerns. A subsequent MRI showed blood in my brain. I was taken to Wichita to see Dr. John Dickerson and underwent surgery at Wesley Medical Center on 6-12-13.

Today is the first chance I have had to formally contact you. Wesley indicated that they have already contact[ed] you about this. Please let me know what I need to do to get my bills paid and get back into Dr. Dickerson.<sup>6</sup>

The entire document was typed, with the exception of the date of accident, which was handwritten in cursive over a blank line. Ms. Haynes received such document on June 20. That same day, Ms. Haynes contacted Scott Kollin, the claims adjuster, and reported claimant was alleging a work-related accident.

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<sup>5</sup> *Id.* at 21-22.

<sup>6</sup> *Id.*, Cl. Ex. 3 at 1.

Claimant later realized she erred regarding the date of injury by accident. She had her husband fax a supplemental notice to respondent on June 25, 2013. Such supplemental notice included her correct date of injury by accident, June 1 (not June 3), along with a corrected date of surgery, June 13 (not June 12). Claimant wrote in the corrected statement that she was a “little confused about time and dates”<sup>7</sup> and had to consult her calendar to ascertain the correct date of injury by accident and review a health insurance statement to provide the correct date of surgery.

Ms. Haynes received claimant’s June 25 fax that very day. Ms. Haynes contacted Mr. Kollin on June 26, who advised her to have claimant complete an accident report.

The only investigation Ms. Haynes performed after receiving claimant’s faxes was to confirm whether claimant worked on the alleged dates. After turning the matter over to their workers compensation representatives, she undertook no additional action other than to mail the employee’s report of accident to claimant and complete the employer’s report of accident.

On October 14, 2013, claimant was seen at her attorney’s request by Paul Stein, M.D., a neurosurgeon, who opined claimant’s symptoms of persistent posttraumatic headaches, mild positional dizziness and mild recent memory difficulty would likely improve over time. He did not believe additional treatment would likely speed up recovery.

On October 31, 2013, claimant was seen by Dr. Dickerson who noted an onset of symptoms in May 2013 after a fall. Dr. Dickerson reported:

Patient observed or reported having an accident Fall in the bathroom and having an accident [a]bout 6 weeks ago in bathroom on wet floor but is unable to recall for sure, but thinks she may have hit her head on the sink.<sup>8</sup>

Claimant denied telling Dr. Dickerson the onset of her symptoms was six weeks prior to surgery. Dr. Dickerson’s report noted that claimant reported being more forgetful.

Dr. Dickerson’s assessment was accidental fall from slipping, tripping or stumbling and subdural hemorrhage following injury with loss of consciousness of unspecified duration and state of consciousness unspecified. Dr. Dickerson recommended speech therapy and a neuropsychological evaluation, as well as continued restrictions.

On November 4, 2013, Dr. Wray issued an addendum to his earlier office note of June 7, 2013, stating:

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<sup>7</sup> *Id.*, Cl. Ex. 3 at 2.

<sup>8</sup> P.H. Trans., Cl. Ex. 1.

In the office on 6/7 [claimant] had informed me that while she was at work she had gone to the bathroom and slipped on the wet floor striking her head. She states she did not experience any symptoms right away but since then she had increasing difficulty with her balance and worsening headaches. This is to the best of my recall to be factual.<sup>9</sup>

Claimant returned to work in September 2013. She continues to work with restrictions. She testified she has daily headaches and accident-related memory loss,<sup>10</sup> as confirmed by her husband.<sup>11</sup>

After considering the evidence, Judge Moore issued a March 7, 2014 Order stating:

Claimant's preliminary hearing requests are **CONSIDERED** and **DENIED**. Claimant has failed to sustain her burden of proof that timely notice of accident was provided. Claimant first provided notice of a claimed June 1, 2013 accident on June 25, 2013, more than 20 days after the claimed accident.

Claimant filed a timely appeal.

#### **PRINCIPLES OF LAW**

K.S.A. 2013 Supp. 44-501b states, in part:

(a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

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<sup>9</sup> *Id.*, Cl. Ex. 5. The June 7, 2012 office note is not in evidence. The information in the November 4, 2013 addendum is contrary to claimant's testimony that she did not tell Dr. Wray about a slip and fall or head injury at work.

<sup>10</sup> *Id.* at 27-29.

<sup>11</sup> *Id.* at 41, 44.

K.S.A. 2013 Supp. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2013 Supp. 44-520 states:

(a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;

. . .

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

The purpose of notice is to afford the employer an opportunity to investigate the claim, provide early diagnosis and treatment, and prepare a defense.<sup>12</sup>

The courts must give effect to the express language of a plain and unambiguous statute rather than determine what the law should or should not be.<sup>13</sup>

### ANALYSIS

K.S.A. 2013 Supp. 44-520 requires notice of injury by accident within various time frames. The notice shall include the time, date, place, person and particulars of the claimed injury. The notice requirement is waived if the employer had actual knowledge of the injury.

The underlying preliminary hearing Order appears to rest on a technicality that claimant's initial attempt at notice on June 20 included the incorrect accident date – June 3 instead of June 1 – and claimant's June 25 fax to respondent with the correct date of injury by accident was provided too late to remedy such error.

Claimant sustained a work-related accidental injury on June 1, 2013. Claimant provided notice, albeit imperfectly, on June 20, 2013, which is within 20 days from the date of her injury by accident. The content of her June 20, 2013 fax demonstrated she was claiming benefits under the workers compensation act and had suffered a work-related injury. As of June 20, respondent had actual knowledge of claimant's injury. Under the facts of this case, this Board Member is not requiring claimant, a brain-injured individual with memory problems, to provide 100% perfect notice.

The fact that the content of her typed June 20 correspondence left blank the date of injury by accident, and she presumably later hand-wrote the incorrect date of injury by accident, illustrates claimant's uncertainty as to her date of injury by accident. Despite claimant's confusion, the information she relayed to respondent on June 20, in addition to respondent being contacted by Wesley Medical Center about claimant's asserted workers compensation injury, was sufficient to give respondent actual knowledge of her asserted injury. The formal requirements for notice under K.S.A. 2013 Supp. 44-520(a) were waived based on respondent having actual knowledge of claimant's alleged injury.

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<sup>12</sup> *Pike v. Gas Service Co.*, 223 Kan. 408, 409-10, 573 P.2d 1055 (1978).

<sup>13</sup> See *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, Syl. ¶ 1, 214 P.3d 676 (2009).

**CONCLUSION**

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member concludes respondent had actual knowledge of claimant's asserted injury, making unnecessary the K.S.A. 2013 Supp. 44-520(a) notice requirements.

**WHEREFORE**, the undersigned Board Member reverses the March 7, 2014 preliminary hearing Order.<sup>14</sup> The matter is remanded for resolution of claimant's request for benefits.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of April 2014.

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HONORABLE JOHN F. CARPINELLI  
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<sup>14</sup> By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.